Supreme Court, U.S.
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No. 97-1128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMERICA WEST AIRLINES, INC.,
Petitioner,
v.
NATIONAL MEDIATION BOARD
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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QUESTIONS PRESENTED

The Petition for Writ of Certiorari incorrectly states the questions presented for review. The Respondent International Brotherhood of Teamsters submits that the questions presented are the following:

1. Whether the Ninth Circuit properly held that a federal court lacks jurisdiction to review a decision of the National Mediation Board when a "peek at the merits" of the underlying case fails to establish that the National Mediation Board either committed a constitutional violation or grossly violated the Railway Labor Act.

2. Whether the National Mediation Board grossly violated the Railway Labor Act by investigating a representation dispute and certifying the Respondent International Brotherhood of Teamsters as the collective bargaining representative for the mechanics and related employees at America West Airlines, Inc. when a majority of indisputably eligible employees voted for representation—and when, in addition, a group of employees who had been discharged during the union's organizing drive, and who were then subject to a pending class action complaint seeking reinstatement, were also permitted to cast ballots through the NMB's challenged-ballot process although their votes did not ultimately affect the outcome of the representation election.

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BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS

STATEMENT OF THE CASE

1. This Petition arises from a lawsuit by America West Airlines that sought to challenge the actions and decisions of the National Mediation Board ("NMB") in investigating a representation dispute, conducting a mail-ballot election, and certifying the Respondent International Brotherhood of Teamsters ("Union") as bargaining representative of a unit of mechanics employed by America West. Pet. App. 4a-5a. The Petitioner's unsuccessful lawsuit focused on an issue decided in the course of the NMB investigation—in particular, the voting eligibility of

certain employees who had been terminated *en masse* by America West during the employees' organizing campaign. Pet. App. 5a. The NMB used a challenged-ballot process to collect and preserve those terminated employees' votes pending a final ruling on their eligibility. Pet. App. 5a. Through its standard administrative processes, the Board eventually determined that the terminated employees were eligible to vote in accordance with NMB regulations and policy, and the NMB counted the disputed votes over America West's objection. Pet. App. 6a. Those disputed votes ultimately proved unnecessary for the Union's election victory, however, because 79% of the *uncontested* voters cast their ballots for the Union. Pet. App. 6a.

2. The mass termination that gave rise to the voting eligibility dispute occurred at the peak of the employees' organizing drive, when the Union had received authorization cards from approximately 85% of the mechanics. SER 6, 36-62.[1] In early December 1995, America West announced that it would subcontract its "heavy" maintenance operation to a non-union firm and terminate 378 of the estimated 750 employees in the mechanics' unit as of January 30, 1996.[2] Pet. 4. America West selected employees for termination out of seniority order, targeting union supporters; contrary to its past practice, moreover, America West denied those terminated employees

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[1] Citations designated "ER—" and "SER—" are to the Excerpts from the Record and Supplemental Excerpts from the Record submitted by America West and the Union, respectively, on appeal to the Ninth Circuit.

[2] America West states that it contracted out the maintenance work "in an effort to reduce its operating costs." Pet. 4. The motive for the contracting-out and mass termination is currently the subject of separate litigation, and neither the district court nor the Court of Appeals decided that question in the present case. The Union contends that America West contracted out and terminated its employees to interfere with the union organizing drive. ER 230-47.

the recall rights that would make them unquestionably eligible to vote in an NMB election. SER 6; ER 243-244. To prevent terminated mechanics from seeking remedies for unlawful discharge, America West offered each affected mechanic a vague, purported "general release" in return for a one time, lump sum severance benefit. After the Union publicly took the position that such a release did not bar a claim for wrongful termination and carrier interference with organizing rights, 375 discharged employees signed the releases. Pet. 4. On December 27, 1995, the Union and five named employee plaintiffs filed a class action lawsuit in the United States District Court for the District of Arizona ("reinstatement action") contesting the dismissals and seeking reinstatement for all terminated mechanics. The terminated employees' reinstatement action was pending at the time of the NMB investigation, election and certification underlying this case, and the district court continues to preside over that separate action at the present time. Pet. App. 2a.[3]

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[3] In the reinstatement action, America West filed a motion to dismiss the claims of the discharged workers who had signed a release agreement, as well as the claims brought by the Union. That motion was not decided until September 4, 1996, more than four months after the completion of the NMB election and certification of the Union. The district court granted the Union leave at that time to proceed with its claims on behalf of currently working employees but dismissed the claims of employees who had signed releases. ER 683, 689. Although the named individual plaintiffs sought and were denied permission under Fed. R. Civ. P. 54(b) to appeal that adverse ruling immediately, they intend to appeal the ruling as a matter of right at the completion of the district court litigation. Accordingly, the effectiveness of the individual releases and the reinstatement rights of those employee plaintiffs have not yet been finally resolved. Similarly, although the district court on September 23, 1997 denied the Union standing to represent currently working employees in the litigation, despite the NMB certification, because their claims required some individual participation, the Union intends to appeal that ruling at the appropriate time. *See Teamsters v. America West Airlines*, 156 L.R.R.M. (BNA) 2490 (D. Ariz. 1997). A discharged employee who did not sign a release is currently prosecuting the case.

3. The Union filed for an NMB investigation of the representation dispute at America West on January 29, 1996. Pet. App. 2a. The voting eligibility of the terminated employees soon became an issue in the NMB investigation, and the agency received extensive documentation and arguments on this point from America West and the Union, including the relevant pleadings and motion papers from the pending reinstatement action. The applicable NMB Rules provided that "[d]ismissed employees whose requests for reinstatement [on] account of wrongful dismissal are pending before proper authorities . . . are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal." 29 C.F.R. § 1206.6. The NMB's Representation Manual, referencing that regulation, similarly provided in § 5.304 that terminated employees may vote in those cases where "the discharge is being appealed through the applicable grievance procedure or an action for reinstatement has been filed before either a court or a government agency of competent jurisdiction," but not where "the grievance or court action has been finally acted upon and the discharge has been upheld prior to the count of ballots." In accordance with these authorities, the NMB Mediator handling the investigation ruled that all 378 terminated mechanics were eligible to vote by virtue of the pending, unresolved reinstatement action. Pet. App. 35a-36a.[4]

4. When the mail ballots issued on March 20, 1996, the NMB followed its longstanding rule and practice by

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[4] America West erroneously states that the Mediator found "that it was sufficient that the IBT itself had filed a putative class action." Pet. 5. In fact, as the Mediator unequivocally recognized, it was the discharged employees themselves who had filed the reinstatement action as class representatives and they, as well as the Union, argued that the releases were unenforceable. ER 528-529. America West repeats this error by asserting that the full Board relied only on the Union's filing of a lawsuit (Pet. 6), when in fact the Board recognized that five employee class representatives brought suit. Pet. App. 32a-33a.

sending "challenged" or "provisional" ballots to the disputed former employees while sending regular ballots to the current employees whose eligibility remained unchallenged. Pet. App. 5a.[5] America West immediately appealed the Mediator's eligibility ruling to the NMB, and both America West and the Union filed extensive briefs on the issue. The NMB decided the appeal on April 17, the day of the ballot count, finding that the pending reinstatement action was not frivolous on its face and that all 378 mechanics were eligible voters pursuant to the NMB's "dismissed employees" rule. Pet. App. 41a. Counting all 722 valid ballots received, including those of the disputed terminated employees, the Union received 587 votes, or an 81% majority. The election results further established that 79% of the employees whose eligibility America West did not challenge had voted for the Union. Pet. App. 6a, 18a. On April 19 the NMB certified the Union as the bargaining representative for the craft or class of Mechanics and Related Employees at America West. Pet. App. 6a.

5. America West brought the present action against the NMB and the Union on April 18, 1996, seeking declaratory and injunctive relief invalidating the NMB certification and prohibiting the Union from bargaining with the carrier. The NMB sought dismissal for lack of subject matter jurisdiction, based on the extremely narrow scope of judicial review of NMB decisions in representation disputes, while the Union filed counterclaims alleging continuing interference with employees' organizing rights and unlawful refusal to bargain following the NMB's certification. Pet. App. 18a. The case was heard and decided

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[5] America West unjustifiably asserts that the decision to mail out challenged ballots was "presumably . . . done so that Board's mail ballot election process would not be delayed[.]" Pet. 5. In fact, the sending out of challenged ballots was entirely consistent with the Board's established practice and the NMB Representation Manual, § 5.304.

by the same judge presiding over the pending reinstatement action against America West. On September 3, 1996, after extensive briefing and oral argument, the district court dismissed America West's claim against the NMB, granted the Union's motion for a preliminary injunction, and denied America West's motion for preliminary relief.[6] Pet. App. 6a. The court ruled, *inter alia*, that the NMB did not "grossly" violate the RLA by allowing the discharged employees to vote and counting their votes, despite their signed releases, at a time when the reinstatement action was pending. Pet. App. 24a. The Petitioner unsuccessfully appealed that decision to the Ninth Circuit and unsuccessfully sought rehearing and rehearing *en banc*. Pet. App. 15a, 16a.

ARGUMENT

This case involves neither a departure from the precedent of this Court nor a conflict among the courts of appeal. Rather, the Petition reflects only disagreement with the Ninth Circuit's application to particular facts of accepted legal standards that limit review of NMB representation cases under the Railway Labor Act ("RLA"). America West seeks to circumvent the NMB's exclusive and plenary authority over representation disputes by substituting a federal court's judgment for that of the NMB with respect to such routine matters as eligibility to vote, issuance of ballots, and the validity of a representation election. The Ninth Circuit's application of the controlling law to reject that challenge fully comports with this Court's RLA jurisprudence and is consistent with the rulings of other circuits.

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[6] America West claims the district court ruled "without allowing any discovery or evidentiary hearings." Pet. App. 8. However, America West never requested any discovery or evidentiary hearings before the district court. The court held a hearing for argument on preliminary injunction motions and America West never requested the right to put on testimony, relying instead on affidavits. *See, e.g.*, ER 44.

1. The RLA's statutory scheme for expeditious final resolution of representation disputes by the NMB entails extraordinarily strict limitations on the ability of unions and employers to challenge the NMB's administrative actions in court. *Switchmen's Union of North America v. NMB*, 320 U.S. 297, 305-306 (1943); *Brotherhood of Ry & S.S. Clerks v. Ass'n for Benefit of Non-Contract Employees*, 380 U.S. 650, 661 (1965). Thus the federal courts *lack subject matter jurisdiction*, except in rare and extraordinary circumstances, to review the conduct and determinations of the NMB in investigating a representation dispute, conducting an election, and certifying a collective bargaining representative. *America West Airlines v. NMB* ("*America West I*"), 986 F.2d 1252, 1256 (9th Cir. 1993) (where NMB acts "with the purpose of finding the fact as to who is the employees' representative, the courts are deprived of jurisdiction to review Board decisions"); *Int'l Ass'n of Machinists & Aerospace Workers v. Trans World Airlines, Inc.*, 839 F.2d 809, 811 (D.C. Cir.), *amended*, 848 F.2d 232 (D.C. Cir. 1988) (scope of review is "one of the narrowest known to law"); *Air Line Pilots Ass'n Int'l v. Transamerica Airlines, Inc.*, 817 F.2d 510, 515 n.3 (9th Cir.), *amended*, 125 L.R.R.M. (BNA) 3107 (9th Cir. 1987). Only where the NMB has violated the U.S. Constitution or has "grossly" violated the RLA may a federal court exercise any power to intervene. *Machinists v. TWA*, 839 F.2d at 811 (citing *Railway Clerks*, 380 U.S. at 659-661).

2. While accepting these controlling principles, America West argues that the courts below made an inadequate inquiry, and reached the wrong result, in finding that the specific circumstances presented here failed to demonstrate a "gross" violation of the RLA.[7] Contrary to that

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[7] The Petitioner has never contended that the NMB committed a constitutional violation. Thus the proceedings below focused on whether the NMB had "grossly" violated the RLA by exceeding its

contention, the district and appellate courts acted entirely properly in refusing to second-guess the NMB's exercise of its exclusive and final authority to certify the Respondent Union. As the Ninth Circuit and other courts have rightly recognized, the principle that courts ordinarily lack jurisdiction to review NMB representational decisions would be rendered meaningless if, in the guise of determining their limited subject matter jurisdiction, federal courts could delve into the merits of the factual and legal issues that were before the NMB. Thus the courts have allowed only a limited inquiry into the underlying dispute—a process that has come to be known as "a peek at the merits"—to determine whether or not subject matter jurisdiction exists. *See Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir. 1989). *Accord: America West I*, 986 F.2d at 1256-1258; *Brotherhood of Maintenance of Way Employees v. Grand Trunk Western R.R.*, 961 F.2d 1245, 1249 (6th Cir. 1992). As used in this case, the "peek at the merits" approach provided more than enough information to determine that the court lacked review jurisdiction here because the NMB exercised its statutory authority in investigating the representation dispute and certifying the election won overwhelmingly by the Union.

3. Neither the district court nor the Ninth Circuit confined their "peek at the merits" to the bare allegations of the complaint. To the contrary, both courts tested as much of the substance of the Petitioner's case as they could legitimately explore in the context of a threshold jurisdictional inquiry. Thus the district court carefully reviewed the parties' pleadings, voluminous factual submissions and arguments—including America West's affidavits and exhibits—to determine whether America West had established a *prima facie* case that the NMB had "grossly" violated the RLA. The district court dismissed

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statutory authority or abdicating its statutory duty with respect to representation matters.

America West's claims for lack of subject matter jurisdiction only after considering, and rejecting on the merits, the carrier's arguments that the NMB had exceeded or abdicated its statutory authority by finding the terminated employees eligible to vote, by sending them challenged ballots, and by counting their ballots. Pet. App. 20a-26a.

In reaching that conclusion, the district court rejected America West's contentions that the NMB had failed to conduct the informal and minimal "investigation" the RLA requires by failing to make an individual inquiry into the reinstatement desires of each terminated employee who had signed a release, before issuing and tabulating the challenged ballots. Pet. App. 24a. The district judge —who presided simultaneously over both the employees' reinstatement action and America West's lawsuit against the NMB—concluded that the NMB permissibly based its voter eligibility determination on the pendency of the class action, and that the NMB was not required to make an individualized inquiry or to make its own administrative determination of the legal sufficiency of the proposed class. Pet. App. 24a-25a. Based on all the submissions in this case, the district court found no legal grounds for countermanding the NMB's certification of the election.

4. These rulings by the district court received full *de novo* review on appeal. Pet. App. 7a. Agreeing with decisions from other circuits, the Ninth Circuit ruled that the trial court's "peek at the merits" sufficed for a determination of subject matter jurisdiction under the RLA. Pet. App. 9a. The record in this case, the Ninth Circuit found, failed to establish the exceptional legal circumstances justifying federal court intervention to review and set aside the NMB's determinations in resolving a representation dispute under the RLA. Pet. App. 12a-13a. As the NMB and the Union demonstrated below, the Ninth Circuit's reasoning and result are clearly consistent with this Court's teachings concerning the extraordinarily limited subject matter jurisdiction available for review of

NMB determinations in representation disputes. To require a more extensive jurisdictional inquiry than the Petitioner received in this case would turn the RLA scheme on its head, making judicial review the rule rather than the rare exception. This Court would not countenance a litigation process that routinely "drags out" RLA representation disputes into other forums, *Switchmen's Union,* 320 U.S. at 305, and leaves NMB actions "unreviewable" only where the federal courts would otherwise sustain the NMB on the merits.

5. Contrary to America West's assertion, there is no "split in the circuits" over the propriety of indulging only a "peek at the merits," rather than full exploration of the merits, to determine the threshold question of subject matter jurisdiction for review. As noted above, the "peek at the merits" terminology that the Ninth Circuit approved in this case and in *America West I* simply borrows *verbatim* the shorthand that has long been used by the D.C. Circuit and other courts to characterize the extremely limited and deferential scope of judicial review prescribed for RLA representation cases. That usage has found general acceptance in RLA cases in the three decades since Judge Leventhal gave it currency in *Int'l Bro. of Teamsters v. Bro. of Railway Clerks,* 402 F.2d 196, 205 (D.C. Cir. 1968),[8] and the federal courts have employed the "peek at the merits" terminology in a variety of other contexts to characterize a similarly limited form

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[8] In addition to the decisions of the Sixth, Ninth and D.C. Circuits cited above, see by way of example *Russell v. NMB,* 714 F.2d 1332, 1339 (5th Cir. 1983) (citing *Teamsters v. BRAC*); *Int'l Ass'n of Machinists v. TWA,* 839 F.2d 809, 812 (D.C. Cir.) (citing *Teamsters v. BRAC*), *amended,* 848 F.2d 232 (D.C. Cir. 1988); *Washington Cent. R.R. Co. v. NMB,* 830 F.Supp. 1343, 1358 (E.D. Wash. 1993) (citing *Professional Cabin Crew*); *Metroflight, Inc. v. NMB,* 820 F.Supp. 288, 290 (N.D. Tex. 1992) (citing *Machinists v. TWA*).

of inquiry.[9] Moreover, the "peek at the merits" allowed in this case accords fully with the limited jurisdictional scrutiny afforded in other circuits that have not yet employed the identical shorthand terminology. *See, e.g., Kiamichi R.R. Co. v. NMB*, 986 F.2d 1341, 1343 (10th Cir. 1993); *Virgin Atlantic Airways, Ltd. v. NMB*, 956

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[9] For example, in *Hardy v. Wigginton* the Sixth Circuit invoked the RLA jurisdictional test by analogy when explaining the appropriate threshold inquiry into retroactivity in a *habeas* case: "Like certain jurisdictional issues, this inquiry requires the court to take 'a peek at the merits.'" 922 F.2d 294, 297 (6th Cir. 1990) (citing *Machinists v. TWA*). *See also United States v. Menichino*, No. 93-1674, 1994 U.S. App. LEXIS 18977, *7 (6th Cir., July 20, 1994) (unpublished decision) ("waiver of a double jeopardy argument cannot be determined without a 'peek' at the merits"). Similarly, the D.C. Circuit has repeatedly invoked the "peek at the merits" terminology in non-RLA cases to characterize limited judicial inquiry. *See, e.g., Lead Industry Ass'n v. EPA*, 647 F.2d 1184, 1187 (D.C. Cir. 1980) ("Of course, this examination is by no means a review of EPA's decision to deny LIA's petition for reconsideration. Rather, our review of the merits is analogous to a court's taking a peek at the merits to assess the likelihood of success in ruling on a motion for a preliminary injunction or a petition for a stay"); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1180 (D.C. Cir. 1980) (noting "some problem of analysis whenever a court's determination of whether it has jurisdiction requires it to take a 'peek at the merits'"), *overruled in part on other grounds, Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984); *Investment Annuity v. Blumenthal*, 609 F.2d 1, 9 (D.C. Cir. 1979) ("a 'peek at the merits' may guide the judge in determining whether there is available jurisdiction for clear deviations from legislative instruction"). *See also In re Catfish Antitrust Litigation*, 826 F.Supp. 1019, 1039 (N.D. Miss. 1993) (cautioning that in deciding a motion for class certification, "a peek into the merits at this stage is very premature and wholly inappropriate"); *United Steel Workers Local 12431 v. Skinner*, 768 F.Supp. 30, 34 (D. R.I. 1991) ("in assessing whether jurisdiction is present because an agency's action clearly violates the Constitution, district courts are entitled to a peek at the merits of the complaint"); *IAM Nat'l Pension Fund v. Schulze Tool & Die Co.*, 564 F.Supp. 1285, 1294 (N.D. Cal. 1983) ("In reaching the decision not to require exhaustion, the court has found it helpful to 'peek' at the merits").

F.2d 1245 (2d Cir. 1992); *Ruby v. American Airlines, Inc.*, 323 F.2d 248, 255 (2d Cir. 1963).

Against this background, the Petitioner's attempt to weave a circuit conflict from *America West I, Int'l In-flight Catering Co. v. NMB*, 555 F.2d 712 (9th Cir. 1977), and *Railway Labor Executives Ass'n v. NMB*, 29 F.3d 655 (D.C. Cir.), *amended*, 38 F.3d 1224 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 1392 (1995), is simply unavailing. As noted above, the Ninth Circuit in *America West I* expressly cited the "peek at the merits" test with approval, 986 F.2d at 1256-1257, and the court there ventured no further than it did here when determining its subject matter jurisdiction. The Ninth Circuit in *Int'l In-flight Catering* similarly characterized the federal courts' limited jurisdictional inquiry as a "peek at the merits," 555 F.2d at 719, and predicated its subject matter jurisdiction on a facial showing that the NMB had failed to investigate: "[*R*]*eviewing a certification after an investigation by the NMB* and reviewing whether the NMB made its statutory investigation at all are two completely different matters. While *we cannot, and do not, review the former*, we can and do review the latter." 555 F.2d at 717 (emphasis added). It is true that the Ninth Circuit reached differing *results* here and in *In-Flight Catering* and *America West I* when determining whether differing circumstances on their face amounted to "gross violation" of the RLA or failure to perform an investigation. But those differences in outcome in no way alter the fact that the court below has followed a consistent standard when evaluating its review jurisdiction.

Finally, the "peek at the merits" approach for determining jurisdiction to review NMB elections and certifications has not been repudiated or undermined by the D.C. Circuit's decision in *Railway Labor Executives*. The court in that case invalidated the NMB's *rulemaking* action adopting procedures for initiation of representation proceedings by carriers as well as the NMB itself, finding such procedures inherently in conflict with the RLA.

Without addressing the underlying merits of an NMB investigation and certification, the court of appeals concluded as a matter of law that the RLA denied the NMB any statutory jurisdiction and authority to conduct a representation investigation absent a request from affected employees. 29 F.3d at 662-671. Unlike the present case, *Railway Labor Executives* did not involve review of the NMB's exercise of its "exclusive" authority to investigate and decide representation disputes; as the court there explained, no such "exclusive" authority was at issue because "[i]f employees have not sought an 'investigation' under Section 2, Ninth, none can be initiated." 29 F.3d at 662. Most significantly, in an opinion issued long after *Railway Labor Executives*, the D.C. Circuit *expressly reiterated its RLA "peek at the merits" standard with approval* when explaining the analogous degree of scrutiny appropriate for deciding intervention in a different context: "The result is somewhat similar to National Mediation Board representation certification cases, where we take a 'peek at the merits' to determine whether we have jurisdiction to review." *United States v. American Bar Association*, 118 F.3d 776, 783 (D.C. Cir. 1997) (citing *Teamsters v. BRAC*).

6. To supplement its unsuccessful challenge to the Ninth Circuit's jurisdictional ruling, America West asks this Court to grant certiorari and decide a substantive issue that the court below appropriately declined to address—that is, the propriety of the NMB's determination that the Petitioner's "dismissed employees" were eligible to vote in the NMB election at a time when their reinstatement lawsuit remained unresolved. Here, again, America West simply disputes the way in which the NMB applied its established voting eligibility regulation and policy, a policy that does not facially amount to a gross violation of the RLA. *See Virgin Atlantic Airways*, 956 F.2d at 1251; *Professional Cabin Crew*, 872 F.2d at 459; *WES Chapter, Flight Eng'rs Ass'n v. NMB*, 314 F.2d 234, 237 (D.C. Cir. 1962). Moreover, in this case the Ninth Circuit properly treated the eligibility of terminated

employees as a moot question, for the fact that a clear majority of America West's indisputably eligible employees voted for the Union made the challenged ballots of the disputed former employees immaterial to the outcome of the election. Pet. App. 13a.

The Petitioner's effort to avoid these hurdles only reaches more deeply into the NMB's exclusive jurisdiction to decide the validity of a representation election and to certify the victorious employee representative. Thus the Petition argues that even though the Union won the election without counting the terminated employees, the NMB election was "irreparably contaminated" by a preliminary administrative determination to count the challenged ballots of terminated employees. Pet. 24. America West, however, cites no provision of the RLA requiring the NMB to void an election based on that theory of taint. This Court must reject the invitation to substitute the judgment of the federal courts for the NMB's final authority to decide objections to NMB representation elections.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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